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# INTERCOLLEGIATE ATHLETICS: THE PROGRAM EXPANSION STANDARD UNDER TITLE IX'S POLICY INTERPRETATION

JULIA LAMBER\*

## I. INTRODUCTION

This nonsense that women have been discriminated against is just that. There wasn't enough interest in athletics before; now there is. But you don't jump to the head of the line. I've been fighting football and basketball for years. Why can they go to the front of the line ahead of me?<sup>1</sup>

In 1971, fewer than 32,000 women competed in intercollegiate athletics.<sup>2</sup> They paid their own way as college student athletes; there were no scholarships, no travel opportunities and no playoffs. They supplied their own equipment, but every once in a while the school bought the team a meal.<sup>3</sup> Today, the National Collegiate Athletic Association (NCAA) sponsors championships for women in nineteen sports and its operating principles and bylaws require gender equity. Although more than 170,000

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1. Anne Stein, *In Sports, A New Title Wave of Challenges for Equity*, CHICAGO TRIBUNE, Apr. 25, 2001, at C1 (quoting J. Robinson, wrestling coach at the University of Minnesota and fierce critic of Title IX).

2. Title IX of the Education Amendments of 1972; The Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,419 (Dec. 11, 1979).

3. See Andy Gardiner, *Great Gains in Exposure*, USA TODAY, Sept. 27, 2001, at C1. At one university, things were so tight that teammates had to share an expensive, paper-thin race suit. Stein, *supra* note 1.

women now participate in intercollegiate athletics,<sup>4</sup> women's participation still compares unfavorably to men's. In 1998–99, women constituted more than half of the undergraduate enrollment (52.5%) but only 42% of intercollegiate athletes, receiving only 45% of the scholarships and 35% of the recruiting budget.<sup>5</sup>

Title IX of the 1972 Education Amendments prohibits sex discrimination in education programs or activities that receive federal financial assistance.<sup>6</sup> The Department of Education, through its Office for Civil Rights (OCR), enforces rules and regulations that clarify the responsibilities of institutions subject to Title IX.<sup>7</sup> The OCR issued the Title IX regulation in 1975,<sup>8</sup> followed by the Title IX *Policy Interpretation* in 1979.<sup>9</sup> The latter guidelines spell out in considerable detail how institutions should meet their Title IX obligations in terms of their athletic programs. Those rules and regulations, which apply to claims of gender discrimination in athletics, fall into three categories: (1) equality of athletic financial assistance,<sup>10</sup> (2) equivalence in other athletic benefits and opportunities,<sup>11</sup> and (3) effective accommodation of student interests and abilities.<sup>12</sup>

The effective accommodation provision of the *Policy Interpretation* requires institutions to select sports and levels of competition that effectively accommodate the interests and abilities of students of both

4. U.S. Dep't Educ. Press Release, available at <http://www.ed.gov/PressReleases/03-2002/03202002.html>. (March 20, 2002).

5. Percentages based on information from individual institutions and their Equity in Athletics Disclosure forms. See *infra* text and note 22.

6. 20 U.S.C. § 1681(a) (2000) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . .").

7. Title IX was originally enforced by the Department of Health, Education, and Welfare (HEW). In 1979, Congress divided HEW into the Department of Health and Human Services (HHS) and the Department of Education. 20 U.S.C. §§ 3401–3510 (2000). The Department of Education then reissued the Title IX regulation without change in 1980, and its Office for Civil Rights (OCR) now has primary responsibility for enforcing Title IX. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 34 C.F.R. § 106 (2001).

8. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 45 C.F.R. § 86 (2001).

9. Title IX of the Education Amendments of 1972; The Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413–19.

10. 34 C.F.R. § 106.37(c); Title IX of the Education Amendments of 1972; The Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415.

11. 34 C.F.R. § 106.37(c)(2)-(10); Title IX of the Education Amendments of 1972; The Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415–17.

12. 34 C.F.R. § 106(c)(1); Title IX of the Education Amendments of 1972; The Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,417–18.

sexes. While institutions have considerable discretion on most aspects of this requirement, the rules are specific about determining the levels of competition. The basic rule is that institutions must provide equal opportunity for individuals of each sex to participate in intercollegiate competition and have competitive team schedules that equally reflect their abilities.<sup>13</sup>

The *Policy Interpretation* allows institutions three ways to comply with this “appropriate level of competition” requirement.<sup>14</sup> First, they can show that intercollegiate participation opportunities for male and female students are substantially proportionate to their respective enrollments (substantial proportionality).<sup>15</sup> Second, if participation rates are not substantially proportionate, the institutions can show a history and continuing practice of program expansion that is responsive to the interests and abilities of the underrepresented sex (continuing program expansion).<sup>16</sup> Third, if neither of the two previous conditions are met, institutions can show that the present athletic program fully and effectively accommodates the interests and abilities of the underrepresented sex (full accommodation).<sup>17</sup> While institutions have attempted to comply with all three provisions of the *Policy Interpretations*, most of the litigation and legal commentary has focused on the substantial proportionality standard.<sup>18</sup> No one yet has carefully analyzed the continuing program expansion standard. Most commentators simply assume that compliance will, at the end of the day, be measured in terms of substantial proportionality, and many opine that as long as football is in the mix, proportionality is an impossible goal.

Part II of this article offers a comparison of Title IX compliers and non-compliers under the substantial proportionality standard based on

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13. Title IX of the Education Amendments of 1972; The Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. See, e.g., *Neal v. Bd of Trs. of Cal. State Univs.*, 198 F.3d 763 (9th Cir. 1999); *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996), *cert denied*, 520 US 1186 (1997); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993); *Kelly v. Bd. of Trs. of the Univ. of Ill.*, 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994). See also, Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: the Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L & POL'Y 51 (1996); Earl C. Dudley & George Rutherglen, *Ironies, Inconsistencies, and Intercollegiate Athletics: Title IX, Title VII, and Statistical Evidence of Discrimination*, 1 VA. J. SPORTS & L 177 (1999); B. Glenn George, *Who Plays and Who Pays: Defining Equality in Intercollegiate Athletics*, 3 WIS. L. REV. 647 (1995); Julia Lamber, *Gender and Intercollegiate Athletics: Data and Myths*, 34 U. MICH. J.L. REFORM 151 (2001); John Weistart, *Equal Opportunity? Title IX and Intercollegiate Sports*, 16 BROOKINGS REV. 39 (1998).

individual data from each school. In an effort to uncover factors that may have an influence on a school's ability to comply with Title IX, I collected data in 1998 from 246 institutions of higher education: 89 Division I-A schools, 50 Division I-AAA schools, and 107 Division III schools.<sup>19</sup> This collection was repeated in 1999 with a higher response rate totaling 329 schools: 92 Division I-A schools, 65 Division I-AAA schools, and 172 Division III schools.<sup>20</sup>

In analyzing the results of the inquiry, I divided the schools into compliers and non-compliers, and classified them by NCAA division and whether they are public or private. Because the casual observer may assume that an institution's affluence influences its ability to meet the substantial proportionality standard, this factor is also considered.

Part III examines a subset of institutions that are the furthest away from complying with the substantial proportionality standard and contrasts them with proportionality compliers in terms of various classification schemes and factors.

Part IV explores information and comments I received from specific schools concerning their strategies for complying with Title IX. While this information reveals that many of these institutions have expanded their women's athletic programs in recent years, comments from schools that are the furthest away from substantial proportionality compliance suggest a sense of futility, a lack of commitment and a lackadaisical attitude toward gender equity.

Part V discusses what actions are sufficient to satisfy the second method of establishing effective accommodation—the continuing program expansion standard. I conclude that good faith and expansion are the keys to further compliance. More importantly, I argue that a focus on process and progress are independently important in effectively implementing Title IX.

Understanding the effects of Title IX, its rules, regulations and interpretations is integral to ensuring nondiscrimination in educational programs. Critics of Title IX's *Policy Interpretation* continue to label it a quota rule, complain about the unintended effects on non-revenue

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19. I requested data from more than 400 schools (all Division I-A and Division I-AAA schools, 110 and 79, respectively, and those Division III schools with football programs, 215). The overall response rate was 61%. The response rates for specific divisions were 81% for Division I-A, 63% for Division I-AAA and 50% for Division III. I call this 1998–99 data “year 1.”

20. I requested data from the same 404 schools. The overall response rate was 81%. The response rates for specific divisions were 91% for Division I-A, 82% for Division I-AAA and 80% for Division III. I call this 1999–2000 data “year 2.”

producing male sports and call for the exemption of football from Title IX requirements.<sup>21</sup> The information collected from more than 300 institutions provides a more complete picture of higher education institutions and their athletic programs from which to evaluate such calls for reform. Moreover, my analysis of the program expansion standard suggests a real alternative to proportionality that properly puts decisions about programs and resources in the hands of institutions and offers potential female plaintiffs real protection.

The ultimate question remains: What does equality look like in today's intercollegiate athletic programs? In 1972 one might have thought the answer was integration, in the form of unisex teams, with participation based on performance. In 2002 separate teams for women and men are nearly universal. We thus have the rare opportunity to think about equality in a strikingly different context.

## II. COMPLIERS AND NON-COMPLIERS

All coeducational institutions of higher education are required to make available quantitative data that provide answers to basic Title IX inquiries: What is the enrollment at the institution? How do the numbers of athletes compare with that enrollment? What is the proportion of the recruitment or aid budget that goes to women athletes? And what are the revenues and expenses for men and women sports?<sup>22</sup>

The various NCAA divisions reflect diverse institutions with a wide array of athletic programs. Higher education institutions that operate Division I-A programs must offer both big-time football and basketball programs. They are characteristically large state universities (more than

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21. Sara Elliott & Daniel Mason, *Gender Equity in Intercollegiate Athletics: An Alternative Model to Achieving Title IX Compliance*, 11 J. LEGAL ASPECTS SPORT 1 (2001); Ross A. Jurewitz, *Playing at Even Strength: Reforming Title IX Enforcement in Intercollegiate Athletics*, 8 Am. U. J. GENDER, SOC. POL'Y & L. 283 (2000). See also Amy Bauer, *If You Build It, They Will Come: Establishing Title IX Compliance in Interscholastic Sports as a Foundation for Achieving Gender Equity*, 7 WM & MARY J. WOMEN & L. 983 (2001). Gary Mihoces, *College Wrestlers Take on Title IX*, USA TODAY, Jan. 17, 2002, at A1 (discussing the wrestling coaches that have recently sued the Department of Education because they allege that the Department pursues a too aggressive enforcement policy).

22. Equity in Athletics Disclosure Act (EADA), 20 U.S.C. § 1092(g) (2000). The statute did not specify a form for the report or where institutions should make their reports. A 1998 amendment, Pub. L. No. 105-244 (codified at 20 U.S.C. § 1092(g)(4)), required institutions to submit the EADA report to the Secretary of Education who was required to make a report to Congress by April 1, 2000. This report was to be available to the public. On March 20, 2002, the Department unveiled a new website with the information, <http://ope.ed.gov/athletics>, and announced it expects to release a one-time report to Congress in the spring. Because the NCAA is interested in similar information, the NCAA had constructed a form that most institutions used to release the EADA information described here.

80% in my sample) with an average undergraduate population around 16,500 students. However, the results of this study demonstrate that their sizes ranged dramatically from 2,649 to 42,465.<sup>23</sup> While the population is generally about evenly divided between men and women, at some institutions as many as 60% of the undergraduates are women.<sup>24</sup>

Higher education institutions that operate Division I-AAA programs are required to offer big-time basketball programs but not intercollegiate football programs. They are a mix of mid-size public and private institutions. In my two-year sample, a little over half of the Division I-AAA institutions were public. The average undergraduate population was around 6,300 students, but sizes ranged from 743 to 16,704.<sup>25</sup> While the average population was about 57% women, at some institutions more than 70% of the undergraduates were women.<sup>26</sup>

Division III institutions are typically small, private schools that do not offer athletically related financial aid. In both years, fewer than 20% were public institutions. While Division III schools may choose whether to offer intercollegiate football, my sample was limited to those that do.<sup>27</sup> The average undergraduate population of these schools was around 2,350, but their sizes ranged from 447 to 10,364.<sup>28</sup> In both years, women accounted for 52% of the undergraduate population, but the range was greater than in other NCAA divisions, spanning from 11% to 67% women.<sup>29</sup>

The most common standard used to measure compliance under Title IX is called "substantial proportionality." Under this standard, institutions show that intercollegiate athletic participation opportunities for male and female students are substantially proportionate to their respective

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23. The actual mean for year 1 is 16,223; year 2 is 16,782. Their sizes range from 37,615 to 2,649 in year 1 and from 42,465 to 2,648 in year 2.

24. The mean female percentage is 51% of the undergraduates in both years. In year 1 the lowest percentage of female enrollment is 16% and the highest is 60%. In year 2, the lowest percentage of female enrollment is 29% and the highest is 61%.

25. The actual mean for year 1 is 6,299; for year 2 is 6,246. Their sizes range from 16,704 to 743 in year 1 and from 16,374 to 813 in year 2.

26. The mean female percentage is 57% in both years. In year 1, the lowest percentage of female enrollment is 50% and the highest is 72%. In year 2, the lowest percentage of female enrollment is 37% and the highest is 72%. Division I also includes Division I-AA, which operates smaller football programs. Division I-A football schools are subject to minimum attendance requirements, but Division I-AA schools are not. NCAA Manual 20.9.6. Division I-AA schools are excluded from my data.

27. Two-thirds of Division III schools offer football.

28. The actual mean for year 1 is 2336; for year 2 it is 2352. Their sizes range from 10,364 to 501 in year 1 and from 9,965 to 447 in year 2.

29. In year 1, the lowest percentage of female enrollment is 11% and the highest is 67%. In year 2, the lowest percentage of female enrollment is 14% and the highest is 66%. My data does not include NCAA Division II schools. These institutions operate smaller athletic programs and offer fewer athletic scholarships than Division I. NCAA Manual 15.5; 20.12.3.

enrollment as undergraduates on campus. Neither Title IX, nor its rules and regulations, specifies what constitutes "substantial proportionality." However, out-of-court settlements require women's athletic participation rate to be within 5% of their enrollment among undergraduates. In order to identify those institutions in my sample that met Title IX's proportionality requirements, I constructed a measure of "participation compliance" to identify institutions within that 5% range.

In comparing the percentage of female undergraduate students with that of female athletes, only 34 (14%) institutions satisfied participation compliance in Year 1, while there were 56 (17%) proportionality compliers in Year 2. Breaking down the institutions by NCAA division for Year 1 and Year 2, there were 14 (16%) and 23 (25%) Division I-A, 11 (22%) and 14 (22%) Division I-AAA, and 9 (8%) and 19 (11%) Division III institutions that met the participation compliance measure, respectively.

TABLE 1 (YEAR 1)

<i>NCAA division</i>	<i>Meets Participation Compliance Measure</i>	<i>Does Not Meet Participation Compliance Measure</i>	<i>Total</i>
Division I-A	14 (16%)	75 (84%)	<b>89</b>
Division I-AAA	11 (22%)	39 (78%)	<b>50</b>
Division III	9 (8%)	98 (92%)	<b>107</b>
<b>Totals</b>	<b>34 (14%)</b>	<b>212 (86%)</b>	<b>246</b>

TABLE 2 (YEAR 2)

<i>NCAA division</i>	<i>Meets Participation Compliance Measure</i>	<i>Does Not Meet Participation Compliance Measure</i>	<i>Total</i>
Division I-A	23 (25%)	69 (75%)	<b>92</b>
Division I-AAA	14 (22%)	51 (78%)	<b>65</b>
Division III	19 (11%)	153 (89%)	<b>172</b>
<b>Totals</b>	<b>56 (17%)</b>	<b>273 (83%)</b>	<b>329</b>

What are the differences between those institutions which were in compliance in terms of proportionality and those which were not? In an effort to better understand the results of my inquiry, I further broke down the numbers by division into compliers and non-compliers, as well as public and private institutions.



## A. PROPORTIONALITY COMPLIERS

Although the Division I-A proportionality compliers were overwhelmingly public institutions, such an outcome is not surprising given that over 80% of the schools in my sample were public institutions.

TABLE 3 (DIVISION I-A)

*Proportionality Compliers*

	<i>Public</i>	<i>Private</i>
Year 1	13 (18%)	1 (6%)
Year 2	19 (25%)	4 (27%)

In Year 1, the average undergraduate population for the proportionality compliers was 17,673, but the range was considerable: from 4,096 to 35,647. In Year 2 these figures were similar, with an average population of 19,256 and a range from 5,885 to 42,465. Keeping in mind that the NCAA average on the whole is 52.5% female, the average gender composition of these complying schools, 56% male in Year 1 and 53% male in Year 2, confirms that it is easier for schools with a large male population to comply with the substantial proportionality standard. Further evidence bolstering this proposition is the observation that while the highest percentage of males among these institutions in Year 1 and Year 2 was 84% and 71%, respectively, the highest percentage of females was only 52% and 56%, respectively.

Division I-AAA proportionality compliers mirrored the make-up of their member institutions with approximately an even number of public and private schools satisfying participation compliance.

TABLE 4 (DIVISION I-AAA)

*Proportionality Compliers*

	<i>Public</i>	<i>Private</i>
Year 1	7 (25%)	4 (18%)
Year 2	7 (21%)	7 (23%)

Interestingly, while there were no institutions where the percentage of women athletes actually outnumbered the percentage of women students in Year 1, there were five such institutions in Year 2. In Year 1, the average undergraduate population for these Division I-AAA proportionality compliers was 7,601, and they ranged from 2,913 to 16,704. In Year 2, these numbers were nearly the same, with an average of 7,576 and a range from 1,977 to 14,726.

In contrast to Division I-A compliers, the average gender composition of the undergraduate population was skewed in favor of females, with only

46% male in Year 1 and 47% male in Year 2. In Year 1 the percentage of males never exceeded 50% in any complying school, while in Year 2, the percentage of men was highest at 63%.

Division III proportionality compliers were slightly different from the other members of their division.

TABLE 5 (DIVISION III)

***Proportionality Compliers***

	<i>Public</i>	<i>Private</i>
Year 1	2 (12%)	7 (8%)
Year 2	4 (15%)	15 (10%)

The average undergraduate population for these Division III proportionality compliers was 2,520 and 2,762 for Year 1 and Year 2, respectively. The ranges for these schools were also similar between the years: 611 to 4,307 and 651 to 5,050.

The average gender composition for these schools was overwhelmingly male. In Year 1 these institutions averaged 69% men, and in Year 2 that number was 62%. In Year 1, the percentage of males reached as high as 89% in one school, and was never lower than 50%. Similarly, in Year 2, the percentage of males reached as high as 86%, and was never lower than 46%. The gender composition of Division III compliers, like those of Division I-A, confirms that it is easier for schools with large male populations to comply with the substantial proportionality standard because a minimal athletics program for women will compare favorably to the small numbers of women undergraduates. In contrast, Division I-AAA schools have larger female populations and therefore need larger athletics programs for women. They do not, however, have football teams to counterbalance.

**B. PROPORTIONALITY NON-COMPLIERS**

On average, the demographic composition of institutions within NCAA Division I-A that failed to meet participation compliance were similar to schools within that division on the whole. Additionally, non-compliers were predominantly public institutions.

TABLE 6 (DIVISION I-A)

***Proportionality Non-Compliers***

	<i>Public</i>	<i>Private</i>
Year 1	60 (82%)	15 (94%)
Year 2	58 (75%)	11 (73%)

The undergraduate population for these non-compliers, just under 16,000 in both years, was smaller than the compliers in Division I-A. The difference was the lower end of the range; the smallest undergraduate population was 2,648.

TABLE 7 (DIVISION I-AAA)

***Proportionality Non-Compliers***

	<i>Public</i>	<i>Private</i>
Year 1	21 (75%)	18 (82%)
Year 2	27 (79%)	24 (77%)

The average undergraduate population for the Division I-AAA proportionality non-compliers was almost 2,000 less than the compliers in this division: 5,931 in Year 1 and 5,864 in Year 2. Additionally, although the high end of the range was approximately the same as compliers for both years (16,283 and 16,374, respectively), the low end, similar to Division I-A, was considerably lower in both years (743 and 813, respectively). Like the compliers in this division, the gender composition of these schools was even more heavily skewed toward females than the compliers in this division, averaging 58% in Year 1 and 59% in Year 2.

Finally, the Division III non-compliers are overwhelmingly private institutions.

TABLE 8 (DIVISION III)

***Proportionality Non-Compliers***

	<i>Public</i>	<i>Private</i>
Year 1	15 (88%)	83 (92%)
Year 2	22 (85%)	130 (90%)

The average undergraduate population for both years was near that of the complying schools in this division, about 2,300. However, the high end of the population ranges was nearly double that of the complying schools—10,364 in Year 1 and 9,965 in Year 2. Also in striking contrast from the compliers in this division is the gender composition. Where the compliers averaged 69% and 62% males for Year 1 and Year 2, the non-compliers averaged only 46% males for both years.

One of the most striking features of these proportionality non-compliers was the large number of women undergraduates at some institutions. On average, women outnumbered men in each NCAA division. Obviously, the larger the percentage of women undergraduates, the larger the women's athletic program needs to be in order to meet the substantial proportionality standard.

Another striking feature of these proportionality non-compliers was that despite the very small enrollments at some institutions, Divisions I-A and III schools all sponsored varsity football. Division I-A teams averaged 117 players, with ranges from 90 to 205. Division III teams averaged 85 participants, with ranges from 26 to 181. The trade-offs for a school with 445 students to sponsor varsity football must be enormous.

Moving from an examination of the demographics of these institutions, I also drew comparisons based on the institution's financial position. One of the most common assumptions about Title IX is that the affluence of an institution influences its ability to comply with Title IX. Specifically, the argument is that a financially strapped institution will find it difficult to comply with Title IX. As part of an institution's public report under the Equality in Athletics Disclosure Act (EADA), institutions are required to report revenues<sup>30</sup> and expenses<sup>31</sup> of its athletic programs. While there are significant limitations with these reports, they represent the best available evidence about the finances of intercollegiate athletic programs.<sup>32</sup>

By comparing revenues and expenses reported in the EADA reports by each institution, I divided the institutions' athletic programs into money makers and money losers.<sup>33</sup> According to the data in my sample, whether an institution's athletic program has positive net revenues, breaks even or has negative net revenues does not determine an institution's compliance with my 5% proportionality standard. Tables 9 through 11 compare net revenues of an institution with its status as a proportionality complier or non-complier for each division.

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30. EADA defines revenues as "gate receipts, broadcast revenues, appearance guarantees and options, concessions, and advertising, . . . student activity fees, or alumni contributions." 20 U.S.C. § 1092(g)(1)(I)(ii) (2000).

31. It defines expenses as "grants-in-aid, salaries, travel, equipment, . . . supplies, . . . [and] overhead." *Id.* at § 1092(g)(1)(J)(ii).

32. JAMES L. SHULMAN & WILLIAM G. BOWEN, *THE GAME OF LIFE* 408–9 n.5 (2001). The authors rely on the information in EADA reports for their discussion of finances and intercollegiate athletics in this recent book on intercollegiate athletics containing data on more than thirty academically selective institutions. *Id.* They caution that the revenue side of the equation is especially difficult to unpack. *Id.* at 244. Some schools provide support to their athletic program for the general fund but the athletic program might report this support as income. *Id.* at 244–45. Other institutions understate their costs by excluding capital costs from the athletic budget. *Id.* Still others may simply have trouble with vague or unclear instructions of what to report on the EADA form. *Id.* Shulman and Bowen do not, however, detect any systematic errors. *See id.*

33. A few institutions report revenues were equal to expenses and I considered them with the money makers.

TABLE 9 (DIVISION I-A)

***Revenues and Expenses***

<i>Year 1*</i>	<i>Proportionality Compliers</i>	<i>Proportionality Non-compliers</i>
Money makers	9	47
Money losers	3	21

<i>Year 2**</i>	<i>Proportionality Compliers</i>	<i>Proportionality Non-compliers</i>
Money makers	15	38
Money losers	7	30

\* No financial information on two compliers and seven non-compliers.

\*\* No financial information on one complier and one non-complier.

TABLE 10 (DIVISION I-AAA)

***Revenues and Expenses***

<i>Year 1*</i>	<i>Proportionality Compliers</i>	<i>Proportionality Non-compliers</i>
Money makers	5	21
Money losers	5	16

<i>Year 2**</i>	<i>Proportionality Compliers</i>	<i>Proportionality Non-compliers</i>
Money makers	5	20
Money losers	9	30

\* No financial information on one complier and two non-compliers.

\*\* No financial information on one institution.

TABLE 11 (DIVISION III)

***Revenues and Expenses***

<i>Year 1*</i>	<i>Proportionality Compliers</i>	<i>Proportionality Non-compliers</i>
Money makers	2	19
Money losers	6	43

<i>Year 2**</i>	<i>Proportionality Compliers</i>	<i>Proportionality Non-compliers</i>
Money makers	7	49
Money losers	11	89

\* No financial information on 37 institutions.

\*\* No financial information on 15 institutions.

A significant percentage of Division I-A athletic programs reported positive net revenues. A smaller, but still considerable, percentage of Division I-AAA athletic programs reported making money. And a still smaller, but noteworthy, percentage of Division III athletic programs reported positive net revenues.<sup>34</sup> While more proportionality non-compliers made money than compliers, a majority of proportionality compliers made money in Division I-A and in Division I-AAA in year 1. The percentage of proportionality compliers who made money in Division III is less, but still notable.<sup>35</sup>

### III. "BIG NON-COMPLIERS" AND RANKING SCHEMES

In order to magnify any differences between compliers and non-compliers, I compared the compliers to a subgroup of non-compliers that were the furthest from meeting participation compliance, called "Big Non-compliers." By utilizing such a subgroup, which consists of 39 institutions, I hope to avoid any assumption that their failure to satisfy the substantial proportionality standard was temporary.<sup>36</sup> This group of Big Non-compliers was similar to the other institutions: they consisted of large and small public and private institutions with positive and negative net revenues for athletic programs of various sizes.

With this smaller group of Big Non-compliers, I looked at two different classification schemes for institutions of higher education: the Carnegie Foundation for the Advancement of Teaching<sup>37</sup> and the rankings of *U.S. News and World Report*,<sup>38</sup> to see if some systematic ranking of

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34. Seventy percent of Division I-A teams reported making money in year 1; 59% reported making money in year 2. 55% of Division I-AAA teams reported making money in year 1; 40% reported making money in year 2. 30% of Division III teams reported making money in year 1; 36% reported making money in year 2.

35. Seventy-five percent of Division I-A compliers reported making money in year 1; 68% in year 2. 50% of Division I-AAA compliers reported making money in year 1; 36% in year 2. Only 25% of Division III compliers reported making money in year 1; 39% in year 2.

36. Most of these institutions are more than 20 percentage points away from meeting the substantial proportionality standard. I took schools from both years and each division; 12 Division I-A schools, 9 Division I-AAA schools, and 18 Division III schools comprise the Big non-compliers. This is not, of course, a random sample.

37. <http://www.carnegiefoundation.org/Classification.index.htm> (last visited Oct. 27, 2002)[hereinafter Carnegie Foundation].

38. *Best National Universities*, U.S. NEWS & WORLD REP. AMERICA'S BEST COLLEGES 2001 ED., at 32; *Best National Liberal Arts Colleges*, U.S. NEWS & WORLD REP. AMERICA'S BEST COLLEGES 2001 ED., at 38; *Best Regional Schools: Universities*, U.S. NEWS & WORLD REP. AMERICA'S BEST COLLEGES 2001 ED., at 42; *Best Regional Schools: Liberal Arts Colleges*, U.S. NEWS & WORLD REP. AMERICA'S BEST COLLEGES 2001 ED., at 52 [hereinafter pp. 32-60 will be collectively referred to as *The Rankings*]; *Directory of Colleges & Universities*, U.S. NEWS & WORLD REP. AMERICA'S BEST COLLEGES 2001 ED., at 117.

various factors was related to an institution's Title IX proportionality compliance.

The Carnegie Foundation for the Advancement of Teaching classifies institutions based on their degree-granting activities.<sup>39</sup> This classification scheme divides institutions into doctorate-granting institutions, master's colleges and universities and baccalaureate colleges.<sup>40</sup> Within each group, the institutions are distinguished by the number of degrees granted or by the nature of the academic program.<sup>41</sup> For example, doctorate-granting institutions offer a wide range of baccalaureate programs and they are committed to graduate education through the doctorate degree.<sup>42</sup>

Doctorate-granting institutions are labeled extensive or intensive, with the former awarding fifty or more doctoral degrees per year in at least fifteen disciplines and the latter awarding at least ten doctoral degrees per year in three or more disciplines.<sup>43</sup> Master's colleges and universities also offer a wide range of baccalaureate programs and they are committed to graduate education through the master's degree.<sup>44</sup> These institutions are labeled I or II, with the former awarding forty or more master's degrees per year across three or more disciplines and the latter awarding twenty or more master's degrees per year.<sup>45</sup> Baccalaureate colleges are primarily undergraduate colleges.<sup>46</sup> Within this group are Liberal Arts colleges, awarding at least half of their baccalaureate degrees in liberal arts field, and General colleges, awarding less than half of their baccalaureate degrees in liberal arts fields.<sup>47</sup> Table 12 illustrates the numbers of proportionality compliers and "Big Non-compliers" within each category.

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39. Carnegie Foundation, *supra* note 37.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* There is also a "Baccalaureate/Associate's college" category, where the majority of conferrals are at the sub-baccalaureate level. The Carnegie Classification of institutions of higher education also includes Associates' colleges, specialized institutions (such as seminaries, law schools, or separate health profession schools) and Tribal colleges and universities. None of the NCAA schools were in the associates' category, but a few fell within the specialized institutions, such as military or maritime academies or schools of engineering. I have omitted these schools from this classification effort.

TABLE 12 (CARNEGIE CLASSIFICATION)

*Proportionality Compliers (Year 1 and Year 2 combined)*

<i>Carnegie Category</i>	<i>Division I-A</i>	<i>Division I-AAA</i>	<i>Division III</i>	<i>Total</i>
Doctoral Extensive	22	6	8	<b>36</b>
Doctoral Intensive	2	4	0	<b>6</b>
Masters I	1	8	3	<b>12</b>
Masters II	0	0	0	<b>0</b>
Baccalaureate Liberal Arts	0	0	6	<b>6</b>
Baccalaureate General	0	0	1	<b>1</b>
<b>TOTAL</b>	<b>25</b>	<b>18</b>	<b>18</b>	<b>61</b>

*"Big Non-compliers" (Year 1 and Year 2 combined)*

<i>Carnegie Category</i>	<i>Division I-A</i>	<i>Division I-AAA</i>	<i>Division III</i>	<i>Total</i>
Doctoral Extensive	3	1	0	<b>4</b>
Doctoral Intensive	4	2	2	<b>8</b>
Masters I	5	6	8	<b>19</b>
Masters II	0	0	3	<b>3</b>
Baccalaureate Liberal Arts	0	0	3	<b>3</b>
Baccalaureate General	0	0	2	<b>2</b>
<b>TOTAL</b>	<b>12</b>	<b>9</b>	<b>18</b>	<b>39</b>

The most striking statistic was that almost 60% of the proportionality compliers were classified as doctorate-extensive institutions, while only 10% of the Big Non-compliers were classified as such. Additionally, institutions within the Master I classification accounted for only 20% of compliers, but accounted for 50% of the Big Non-compliers. Although this classification scheme is a useful, descriptive piece of information, it does not suggest an obvious way to determine whether a school meets Title IX's substantial proportionality standard.



*U.S. News and World Report* also ranks higher education institutions, but categorizes them as either a National University, a National Liberal Arts College, a Regional University or a Regional Liberal Arts college. Table 13 shows how proportionality compliers and Big Non-compliers from each division fit within several *U.S. News and World Report* categories.<sup>48</sup>

TABLE 13 (U.S. NEWS CLASSIFICATION - TYPE OF INSTITUTION)

***Proportionality Compliers (Year 1 and Year 2 combined)***

<i>U.S. News Category</i>	<i>Division I-A</i>	<i>Division I-AAA</i>	<i>Division III</i>	<i>Total</i>
National University	24	9	8	<b>41</b>
National Liberal Arts	1	9	3	<b>13</b>
Regional University	0	0	6	<b>6</b>
Regional Liberal Arts	0	0	1	<b>1</b>
<b>TOTAL</b>	<b>25</b>	<b>18</b>	<b>18</b>	<b>61</b>

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48. *The Rankings*, *supra* note 38, at 32–60, *Directory of Colleges & Universities*, *supra* note 38, at 117–294. *U.S. News and World Report* releases these rankings annually. I used their data from the 2001 edition and often used information available on their web site: <http://usnews.com>. *U.S. News* groups schools into one of ten categories based on the Carnegie classification. It collapses the eight categories of the Carnegie scheme into four (National Universities, National Liberal Arts Colleges, Regional Universities, and Regional Liberal Arts Colleges) and then divides the Regional Universities and Regional Liberal Arts Colleges into one of four geographic regions (North, South, Midwest, and West). Specialized schools, such as military academies, are not ranked by the *U.S. News* and were therefore omitted from analysis. Robert J. Morse & Samuel M. Flanigan, *How we rank colleges*, *U.S. NEWS & WORLD REP. AMERICA'S BEST COLLEGES 2001 ED.*, at 28, available at <http://www.usnews.com/usnews/edu/college/rankings/about/conrnkdfs.htm>.

***“Big Non-compliers” (Year 1 and Year 2 combined)***

<i>U.S. News Category</i>	<i>Division I-A</i>	<i>Division I-AAA</i>	<i>Division III</i>	<i>Total</i>
National University	5	3	1	<b>9</b>
National Liberal Arts	0	0	5	<b>5</b>
Regional University	7	6	9	<b>22</b>
Regional Liberal Arts	0	0	3	<b>3</b>
<b>TOTAL</b>	<b>12</b>	<b>9</b>	<b>18</b>	<b>39</b>

Almost 90% of the proportionality compliers were national institutions, either universities or colleges, while less than 40% of the Big Non-compliers were national schools. In contrast, while only 11% of compliers were regional institutions, 64% of the Big Non-compliers were classified as such.

Table 14 shows the distribution of institutions according to “tiers,” but without regard to the national or regional level of college or university.<sup>49</sup>

TABLE 14 (U.S. NEWS CLASSIFICATION - REPUTATION AND QUALITY)

***Proportionality Compliers (Year 1 and Year 2 combined)***

<i>U.S. News Category</i>	<i>Division I-A</i>	<i>Division I-AAA</i>	<i>Division III</i>	<i>Total</i>
1st Tier	8	7	12	<b>27 (44%)</b>
2nd Tier	10	4	4	<b>18 (30%)</b>
3rd Tier	5	2	2	<b>9 (15%)</b>
4th Tier	2	5	0	<b>7 (11%)</b>
<b>TOTAL</b>	<b>25</b>	<b>18</b>	<b>18</b>	<b>61</b>

***“Big Non-compliers” (Year 1 and Year 2 combined)***

<i>U.S. News Tiers</i>	<i>Division I-A</i>	<i>Division I-AAA</i>	<i>Division III</i>	<i>Total</i>
1st Tier	2	1	6	<b>9 (23%)</b>
2nd Tier	4	1	4	<b>9 (23%)</b>
3rd Tier	3	0	3	<b>6 (15%)</b>
4th Tier	3	7	5	<b>15 (38%)</b>
<b>TOTAL</b>	<b>12</b>	<b>9</b>	<b>18</b>	<b>39</b>

49. I ignored the “type of institution” (i.e., national or regional) to simplify the presentation. Moreover, I think an institution’s reputation can be considered without regard to the type of institution.

Schools with the highest academic reputation also reported the highest proportionality compliance rates. Forty-four percent of the proportionality compliers were first tier schools, while only 23% of the Big Non-compliers were in the top tier. To amplify, although both proportionality compliers and Big Non-compliers were found in each tier, compliers had the highest concentration in the first tier, while the Big Non-compliers were most densely found in the fourth tier. Furthermore, although there was a significant number of Division III schools in the first tier in both the proportionality compliers and Big Non-compliers tables, those schools accounted for 2/3 of the compliers, and only 1/3 of the Big Non-compliers.

Table 15 reports the distribution of proportionality compliers and Big Non-compliers according to the *U.S. News* measure of "selectivity" in admissions, again without regards to the institution's classification as a national or regional level college or university.<sup>50</sup>

TABLE 15 (U.S. NEWS CLASSIFICATION – SELECTIVITY)

***Proportionality Compliers (Year 1 and Year 2 combined)***

<i>Admissions Selectivity</i>	<i>Division I-A</i>	<i>Division I-AAA</i>	<i>Division III</i>	<i>Total</i>
Most Selective	2	0	6	<b>8 (13%)</b>
More Selective	14	8	8	<b>30 (49%)</b>
Selective	9	7	1	<b>17 (28%)</b>
Less Selective	0	2	1	<b>3 (5%)</b>
Least Selective	0	1	2	<b>3 (5%)</b>
<b>TOTAL</b>	<b>25</b>	<b>18</b>	<b>18</b>	<b>61</b>

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50. Morse & Flanigan, *supra* note 48, at 30. Selectivity is based on acceptance rate, yield, high school class standing, and SAT/ACT scores.

***“Big Non-compliers” (Year 1 and Year 2 combined)***

<i>Admissions Selectivity</i>	<i>Division I-A</i>	<i>Division I-AAA</i>	<i>Division III</i>	<i>Total</i>
Most Selective	0	0	0	<b>0 (0%)</b>
More Selective	4	0	5	<b>9 (23%)</b>
Selective	7	3	9	<b>19 (49%)</b>
Less Selective	1	4	4	<b>9 (23%)</b>
Least Selective	0	2	0	<b>2 (5%)</b>
<b>TOTAL</b>	<b>12</b>	<b>9</b>	<b>18</b>	<b>39</b>

On average, the proportionality compliers were more selective in their admission than the Big Non-compliers, with nearly half of the proportionality compliers ranked in the second most selective category, while nearly half of the Big Non-compliers ranked in the third most selective category. On a broader spectrum, 62% of proportionality compliers were ranked in the two most selective categories, while only 23% of the Big Non-compliers were ranked in those categories.

While none of these measures offer a profound, undeniable explanation that link to Title IX proportionality compliance, they provide some basis for comparison among the compliers and non-compliers in general.<sup>51</sup> This information suggests proportionality compliers are better academic schools than non-compliers, in terms of both overall academic reputation and selectivity in admissions.

Turning away from indicators of academic quality, I also compared proportionality compliers and Big Non-compliers on two other measures reported in *U.S. News*: diversity and living on campus. A school is considered to be “diverse” if the minority population is greater than the national average of 17% of the population.<sup>52</sup> Table 16 shows the percentage

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51. *Id.* *U.S. News* explains that its ranking system rests on two propositions: First, it uses quantitative measures that education experts regard as reliable indicators of academic quality. Second, the rankings are based on *U.S. News*’ view of what matters in education. The indicators of academic quality include academic reputation, retention of students, faculty resources, student selectivity, financial resources, alumni giving and graduation rate performance.

52. *Campus Diversity*, U.S. NEWS & WORLD REP. AMERICA’S BEST COLLEGES 2001 ED., at 73; *Directory of Colleges and Universities*, *supra* note 38. I coded this data using a comparison function found at the *U.S. News* website. <http://www.usnews.com/usnews/edu/college/tools/brief/coworks-brief.php>, see also *The Rankings Online*, U.S. NEWS & WORLD REP. AMERICA’S BEST COLLEGES 2001 ED., at 31 (describes how to use the web tools to compare colleges).

of proportionality compliers and Big Non-compliers on this diversity measure.

TABLE 16 (U.S. NEWS CLASSIFICATION – DIVERSITY)

	<i>Proportionality Compliers</i>	<i>"Big Non-compliers"</i>	<i>Total</i>
Diverse	40	21	<b>61</b>
Not Diverse	21	18	<b>39</b>
<b>Total</b>	<b>61</b>	<b>39</b>	<b>100</b>

Thus, based on this measure of diversity, it appears as though more racially diverse schools tend to also better accommodate women with respect to athletic opportunities, as 66% of the diverse institutions were proportionality compliers, while 54% of non-diverse schools were Big Non-compliers.

*U.S. News* also reports the percentage of students living off campus.<sup>53</sup> This measure provides a rough indication of whether an institution is a commuter school. It is not, however, an exact measure because institutions who may define themselves as having a residential character or campus community may in fact have a high percentage of its students living off campus. Table 17 shows proportionality compliers and Big Non-compliers measured against the percentage of students living off campus.

TABLE 17 (U.S. NEWS CLASSIFICATION – COMMUTERS)

<i>Percentage of Students Living Off Campus</i>	<i>Proportionality Compliers</i>	<i>"Big Non-compliers"</i>	<i>Total</i>
80% or more	12	16	<b>28</b>
26% - 79%	35	20	<b>55</b>
25% or less	14	3	<b>17</b>
<b>Total</b>	<b>61</b>	<b>39</b>	<b>100</b>

Only 8% of the Big Non-compliers had at least 75% of their students living on campus, whereas 23% of the proportionality compliers had such a high on campus living percentage. In contrast, 41% of the Big Non-compliers had more than 80% of their students living off campus, compared to 20% of the compliers. Thus, it appears as though commuter schools are less likely to comply with Title IX, although the reason for such a failure is not immediately apparent.

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53. *Directory of Colleges and Universities*, *supra* note 38.

## IV. COMMENTS BY INDIVIDUAL INSTITUTIONS

In order to learn more about specific institutions, in the fall of 2000 I contacted each proportionality complier and Big Non-complier in my two-year sample and made further inquiries with respect to: (1) their Title IX compliance plans; (2) changes made within the athletic department and (3) any other strategies used to meet the substantial proportionality standard. For Division I institutions, I also asked for their gender equity plan for the NCAA Certification process, which all Division I schools are required to have.<sup>54</sup>

Responses varied with respect to the type of information sent as well as its quality and specificity. While some institutions did not respond at all, and others merely sent their EADA forms, some institutions went as far as providing their gender equity plans, and still others provided specific information about long-range plans for their athletic programs.

In examining the EADA forms for each institution,<sup>55</sup> I paid particular attention to the space that was provided for “additional information,” where the institutions are encouraged to provide any information they believe might be helpful in interpreting the required information, or that might help a prospective student athlete make an informed choice about an athletics program. The form itself suggests that an institution might include a history of its athletic programs or explanation of unusual or exceptional circumstances that would better explain the data. Given the public nature of these documents, one might expect institutions to use this space to explain why their athletic program does not meet the substantial proportionality standard or to tout specific improvements, signs of program expansion, or other competitive advantages their athletic programs offer. Less than half, however, included any substantive information.

Among the proportionality compliers, several mentioned adding women’s teams and increasing the money to women’s sports to upgrade coaches or full-fund athletic scholarships, and two compliers mentioned dropping a men’s team. Comments by Big Non-compliers were surprisingly similar. A smaller number mentioned adding women’s teams

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54. The NCAA began with the Certification process for Division I schools in 1993. To ensure that Division I schools comply with the operating principles and bylaws of the NCAA, certification begins with an institutional self-study that includes a written plan for addressing gender equity in the intercollegiate athletics program at the institution. 2002–03 NCAA DIVISION I ATHLETICS CERTIFICATION HANDBOOK, 22 (2002), available at [http://www.ncaa.org/library/membership/dl\\_athletics\\_cert\\_handbook/2002-03/2002-03\\_athletics\\_cert\\_handbook.pdf](http://www.ncaa.org/library/membership/dl_athletics_cert_handbook/2002-03/2002-03_athletics_cert_handbook.pdf). See Lamber, *supra* note 18, at 206–10.

55. Neither the legislation nor the implementing regulation prescribes a particular form for the report, but most schools used a form provided by the NCAA. 34 C.F.R. § 668.48 (2001).

and increasing financial support for women's sports, but no institutions mentioned dropping a men's team. However, several Big Non-compliers discussed their intent to formulate a long-term plan for the athletics department.

The supplemental information I received in addition to the EADA forms contain claims of similar actions and plans designed to improve the proportionality of female athletes to female students.<sup>56</sup> Proportionality compliers explained their strategy as expanding women's opportunities, capping participation on men's teams and hiring more women to coach. Of the Big Non-compliers, eight explained they had added a women's team in the past five or ten years, but most responses suggested a helplessness in terms of achieving gender equity. For example, both compliers and Big Non-compliers agreed that coaches are a key factor. Compliers reported that one effective strategy to Title IX proportionality compliance is to impress upon coaches the importance of gender equity in terms of enforcing roster limits or encouraging participation prior to their hiring. Big Non-compliers explained that they would like gender equity to become part of a coach's performance evaluation.

Athletic directors of some Big Non-complier schools offered interesting explanations for their failure as well. One explained the extreme lack of proportionality by saying: "We are a victim of our own success. We have three high profile men's teams."<sup>57</sup> Another athletic director, new to the job, suggested the athletic department sometimes plans without really focusing on gender equity, and opined the institution would never achieve substantial proportionality under the existing plan.

The helpless attitude was exhibited by athletic directors regardless of the division in which they competed. An athletic director of a Division III school explained: "We all have the same problem. More women students than men, more men participating in sports than women, and fairly large football teams."<sup>58</sup> There was no sense of urgency to change this mix; he was just resigned to this reality. Another Division III athletic director perceived gender equity as a "Catch 22": schools see football as a key recruiting device to increase the number of male students on campus, but know the existence of a football team, because of its large roster, will lead to the need for more women's sports and participation opportunities. He said: "Rates will never be proportional with the undergraduate population because of the approximately 100 football team members and a consistent

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56. I received some kind of additional information from 74% of the Big Non-compliers.

57. Letter dated February 5, 2001 from athletic director. Letter is on file with author.

58. Letter dated December 4, 2000 from athletic director. Letter on file with author.

pattern of yearly admissions' recruitment that has done little to increase male enrollment."<sup>59</sup>

The final explanation for non-compliance, offered by several athletic programs, was that they were "commuter" schools without a tradition of intercollegiate athletics.<sup>60</sup> According to these athletic directors, the students on these campuses are older, have family responsibilities and work in addition to going to school. This characterization might explain why a school does not have a distinguished intercollegiate athletic program, or why few students (male or female) participate in athletics, but it does not explain why its status as a commuter school would result in disparate athletic opportunities for men and women.

Thus, specific information from these institutions often suggests a sense of futility, a lack of commitment and a lackadaisical approach to planning. Nonetheless, many of these institutions have added at least one women's team or sport in the last few years. Can that simple expansion change the status of the Big Non-compliers under the "program expansion" standard of Title IX's *Policy Interpretation*?

## V. PROGRAM EXPANSION

The Title IX *Policy Interpretation* spells out in considerable detail how institutions can meet their Title IX obligations in terms of their athletic programs in general, and their obligation to effectively accommodate students' interests and abilities in particular.<sup>61</sup> In this latter area, the Office for Civil Rights (OCR) assesses compliance by examining the determination of athletic interests and abilities of students, the selection of sports offered, and the levels of competition available, including the opportunity for team sports.<sup>62</sup> While the *Policy Interpretation* gives institutions considerable flexibility in assessing student interests and deciding what sports to offer, it is fairly specific about determining appropriate levels of competition.<sup>63</sup> The fundamental principle in determining levels of competition is that institutions must provide the opportunity for individuals of each sex to have competitive team schedules that equally reflect their abilities.<sup>64</sup>

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59. Letter dated Jan. 1, 2001 from athletic director. Letter on file with author.

60. Letter dated Jan. 5, 2001 from athletic director; letter dated Feb. 5, 2001 from athletic director; letter dated Jan. 17, 2001 from chair of gender equity committee. Letters on file with author.

61. Title IX of the Education Amendments of 1972; The Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413-19.

62. *Id.* at 71,417.

63. *Id.* at 71,418.

64. *Id.*



As mentioned previously, under the *Policy Interpretation*, there are three ways for an institution to show it provides appropriate levels of competition.<sup>65</sup> First, as just discussed, it can show that intercollegiate participation opportunities for male and female students are substantially proportionate to their respective enrollments (substantial proportionality).<sup>66</sup> Second, the institutions can show a history and continuing practice of program expansion that is responsive to the student interests and abilities of the underrepresented sex (continuing program expansion).<sup>67</sup> Third, the institution can show that the present athletic program fully and effectively accommodates the interests and abilities of the members of the underrepresented sex (full accommodation).<sup>68</sup> While most of the litigation has focused on the substantial proportionality standard, the second standard—continuing program expansion—has not been thoroughly tested or examined. All of the institutions in my sample added women's sports in the early days of Title IX, and nearly all of them have added one women's team in the last few years. Is this action sufficient to meet the second standard? Specifically, does it show that a particular institution has a history and continuing practice of program expansion that is responsive to the interests and abilities of the underrepresented sex? If so, why is this sufficient? If not, why not?

In 1996, the OCR issued the *Clarification of Intercollegiate Athletic Policy Guidance* (hereinafter *Clarification*) on the *Policy Interpretation's* three-part test used to assess an institution's effective accommodation of students' athletic interests and abilities.<sup>69</sup> The *Clarification* describes specific factors to guide an analysis under each part of the test and provides examples to illustrate how these factors will be considered in determining whether an institution is in compliance with Title IX under the continuing expansion standard.<sup>70</sup> The *Clarification* explains that this standard evaluates an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion. It focuses on whether an institution has expanded the number of intercollegiate participation opportunities provided to the underrepresented sex.<sup>71</sup> No time periods during which sports must have been added are

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. OFF. CIV. RTS., U.S. DEP'T EDUC., *Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test* (Jan. 16, 1996) [hereinafter *Clarification*], at <http://www.ed.gov/offices/OCR/docs/clarific.html>.

70. *Id.*

71. *Id.*

specified and no particular sports must be added.<sup>72</sup> Rather, according to the *Clarification*, the focus is on the responsiveness of the program to the developing interests and abilities of the underrepresented sex.<sup>73</sup>

The *Clarification* identifies certain factors that the OCR will consider evidence of a *history* of program expansion: an institution's record of adding women's teams, an institution's record of increasing the number of female participants, and an institution's affirmative responses to requests by students and others to add or to upgrade sports.<sup>74</sup> The *Clarification* then identifies the factors that the OCR will consider evidence of a *continuing* practice of program expansion: the current implementation of a policy for requesting the addition of sports and the effective communication of that policy to students, as well as the current implementation of a plan of program expansion that is responsive to developing interests and abilities.<sup>75</sup>

The *Clarification* also specifies two situations in which the OCR will not find a history of program expansion. First, there is no expansion if an institution increases proportional participation opportunities by reducing opportunities for the overrepresented sex.<sup>76</sup> While cutting or capping men's teams can help an institution reach substantial proportionality between the percentage of male and female students and their respective undergraduate populations, the *Clarification* makes clear that cutting or capping men's teams cannot be part of "continuing program expansion." Second, there is no history of expansion if an institution added sports for the underrepresented sex only at the beginning of its program for that group or where it merely promises to expand its program sometime in the future.<sup>77</sup> Thus, program expansion requires the addition of sports over time and according to a specific plan.<sup>78</sup>

One of the few cases to specifically address the "continuing program expansion" standard is *Boucher v. Syracuse University*.<sup>79</sup> In *Boucher*, the female plaintiffs, potential lacrosse and softball varsity players, alleged that the University was in violation of Title IX because it failed on both the full

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72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* This section of the *Clarification* concludes with specific hypothetical examples that illustrate the factors discussed.

78. *See id.*

79. *Boucher v. Syracuse Univ.*, No. 95-CV-626, 1996 U.S. Dist. LEXIS 8329 (N.D.N.Y. 1996), *Boucher v. Syracuse Univ.*, No. 95-CV-620, 1998 U.S. Dist. LEXIS 5042 (N.D.N.Y. 1998).

accommodation and the substantial probability standards.<sup>80</sup> Rather than rule on these claims, the District Court held that the University had a history and continuing practice of program expansion and thus was not in violation of Title IX.<sup>81</sup>

The Court noted that Syracuse established its women's athletic program in 1971, creating separate women's teams in five sports.<sup>82</sup> Syracuse added additional women's team sports in 1977, 1981, 1996 and 1997 and it announced plans to add another women's sport in 1999.<sup>83</sup> From 1982-95, a period during which no women's sports were added, the number of female participants on the existing sports teams increased 46%, from 148 to 217, while male participants on varsity teams increased by only 3%.<sup>84</sup> Thus, the court held that Syracuse satisfied the *Clarification's* standard for establishing a history of program expansion.<sup>85</sup>

However, Syracuse did not establish that any formal policy was in place so that students could request the addition of sports.<sup>86</sup> There was no formal plan of program expansion responsive to developing interests and abilities of women.<sup>87</sup> The Court noted that "the spirit of Title IX would be better served were the institution to implement a more formal policy by which students could bring their interests and abilities to the attention of the administration."<sup>88</sup> Nonetheless, the Court still found that Syracuse had "continued a practice of program expansion which is responsive to the abilities and interests of its student body."<sup>89</sup> The Court, in part, based this conclusion on the testimony of Syracuse's athletic director, who said that he had recently added the two women's sports in response to monitoring and gathering information regarding club sports participation at Syracuse, prospective competition with other schools, and the developing interests and abilities at national, regional and local levels of competition.<sup>90</sup>

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80. *Boucher*, 1996 U.S. Dist. LEXIS 8329, at \*1. Plaintiffs also brought an "equal treatment" claim, alleging that female varsity athletes did not receive the same benefits as male varsity athletes. The court dismissed this claim because the plaintiffs were not varsity athletes and thus did not have standing to challenge the unequal treatment.

81. *Id.* at \*13.

82. *Id.* at \*2-3.

83. *Id.* at \*10.

84. *Id.*

85. *Id.*

86. *Id.* at \*12.

87. *Id.*

88. *Id.* at \*13.

89. *Id.*

90. *Id.* at \*12.

However, the key was the actual addition of the two sports with the definite plan for a third sport.<sup>91</sup>

The relative ease with which Syracuse established its history and continued practice of program expansion contrasts with the history of women's sports at Brown University. When Brown eliminated two women's varsity teams, female plaintiffs sued the University under Title IX.<sup>92</sup> Brown's primary argument was to allege compliance with Title IX under the full accommodation standard, although it also initially claimed that it satisfied the continuing program expansion standard.<sup>93</sup>

Brown University, like Syracuse University, had substantially expanded its athletic program for women in the 1970s after Brown became a co-educational institution.<sup>94</sup> Brown also added one women's sport in 1982 and another in 1994.<sup>95</sup> Unlike Syracuse, however, where women's participation in sports increased even during the period when no new women's sports were added, the athletic participation at Brown remained fairly constant.<sup>96</sup>

In an attempt to reduce the disparity between men and women's participation opportunities, and thereby move toward substantial proportionality, Brown had eliminated several men's teams.<sup>97</sup> The Court held, however, that reducing opportunities for men did not demonstrate

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91. On appeal, the Court disposed of the case on procedural grounds while expressly reserving judgment on the University's program expansion claim. *Boucher v. Syracuse Univ.*, 164 F.3d 113 (2d Cir. 1999). The Court of Appeals noted that once the University created a women's varsity lacrosse team, the claim of the lacrosse plaintiffs was moot. The Court of Appeals then ruled that the softball claim should not have been dismissed, but rather directed the District Court on remand to dismiss the softball claim as moot if the University followed through on its plans to establish a softball team. If the University had not, the District Court was ordered to certify a separate class for potential softball players and revisit the merits. In any event, the Court of Appeals chose not to reach the merits of the University's "safe harbor defense."

92. Named plaintiffs were members of the two women's sports to lose varsity status: gymnastics and the volleyball teams. *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993), *remanded to* 879 F. Supp. 185 (D.R.I. 1995), *aff'd in part and rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997).

93. See *Cohen*, 101 F.3d at 169-70, 174-76; Walter B. Connolly, Jr. & Jeffery D. Adelman, *A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. DET. MERCY L. REV. 845, 880-93 (1994); Brake & Catlin, *supra* note 18, at 78-82.

94. *Cohen*, 809 F. Supp. at 981.

95. *Id.* at 991. The women's team added in 1982 was winter track, a sport that involved providing indoor space to the existing women's track team.

96. *Id.* at 985.

97. *Id.* at 981.

"program expansion" for women.<sup>98</sup> According to the Court, the program expansion standard "illustrates that 'Title IX does not require that the university leap to complete gender parity in a single bound,'" but it did require a university to continue to expand the opportunities for women.<sup>99</sup>

Brown also argued that program expansion did not require increased numerical participation. It had considerable evidence to show growth in the women's athletic program, such as improved coaching for women's teams, increased competition for women, and greater use of "special admissions" to field women's teams.<sup>100</sup> The District Court rejected this argument, holding that program expansion requires a court to "address past actions and future plans to add or eliminate sports, taking into consideration the interests and abilities of the underrepresented sex."<sup>101</sup> There was little evidence of expansion given that the plaintiffs' complaint stemmed from Brown's decision to eliminate two women's teams.

A broad view of the program expansion standard would be difficult for an institution to meet.<sup>102</sup> Such a view, hinted at by the court in *Bryant v. Colgate*, interprets the program expansion standard in the context of the early days of Title IX and intercollegiate athletics.<sup>103</sup> In *Bryant*, female plaintiffs alleged the University's athletics program was in violation of Title IX in all respects (scholarships, equal benefits, and effective accommodation).<sup>104</sup> After dismissing scholarship and equal benefits claims for lack of standing, the District Court refused to grant summary judgment to either party on the effective accommodation claim.<sup>105</sup> According to the court, Colgate could demonstrate a history of program expansion for female athletes from 1973 to 1989.<sup>106</sup> During this time, Colgate started a

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98. *Cohen*, 879 F. Supp. at 211. The Office for Civil Rights takes this position in their policy clarification, which was published a the following year, in 1996. *Clarification*, *supra* note 69, at <http://www.ed.gov/offices/OCR/docs/clarific.htm>.

99. *Cohen*, 879 F. Supp. at 207 (quoting *Cohen*, 991 F.2d at 898).

100. *Cohen*, 809 F. Supp. at 991.

101. *Id.*

102. See Robert C. Farrell, *Title IX or College Football?* 32 HOUS. L. REV. 993, 1044 (1995) (arguing that the test should be seen as a temporary device, making sense in 1979 when adopted but making little sense in the late 1990s because "most of the continuing 'program expansion' has been in response to lawsuits."). See also Susan M. Shook, *The Title IX Tug-of-War and Intercollegiate Athletics in the 1990's: Nonrevenue Men's Teams Join Women Athletes in the Scramble for Survival*, 71 IND. L.J. 773, 799 (1996) (noting that the test is less controversial and has met less criticism because the Policy Interpretation did not try to "outline the exact parameters of 'institutions' future responsibilities but did want to ensure that 'institutions remain obligated...to accommodate effectively the interests...of...students with regard to the selection of sports and levels of competition available.'").

103. 1996 U.S. Dist. LEXIS 8393 (N.D.N.Y. 1996).

104. *Id.* at \*1.

105. *Id.* at \*12-18.

106. *Id.* at \*37.

female varsity program with five sports and expanded it to nine teams by 1989.<sup>107</sup> The Court noted, however, the importance of persistence, especially in light of the developing interests and abilities of women students at Colgate and its secondary feeder schools.<sup>108</sup> The Court implied that Colgate's efforts to expand opportunities for women were temporarily halted and merely awaited further development of the interests and abilities of women athletes.<sup>109</sup>

In contrast, the "proportionality non-compliers" examined in this study would probably argue for a narrow reading of the program expansion standard.<sup>110</sup> According to this view, expansion is the key, and the fact that these institutions expanded opportunities for women in the 1970s and added at least one women's sport in the last few years is sufficient.<sup>111</sup>

The correct reading of the continuing program expansion standard lies in the validity of the *Policy Interpretation's* three-part test itself. The overarching question under Title IX is what does it mean to offer intercollegiate athletics in a nondiscriminatory way? One might have thought the answer was integration (in the form of unisex teams), since eliminating segregation was the nondiscrimination goal in public education, equal employment opportunity and housing. However, colleges and universities did not open up men's teams, and Title IX does not require them to.

The purpose of the continuing program expansion standard is unclear compared to the substantial proportionality and full accommodation standards. Substantial proportionality has the advantage of being easily understood, readily measured and capable of making comparisons across

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107. *Id.* at \*36.

108. *Id.* at \*37.

109. *See id.* *See also Cohen*, 991 F.2d at 898 (holding that a university that continually expands athletic opportunities in an ongoing effort to meet the needs of the underrepresented gender and persists in this approach as interest and ability levels in its student body and secondary feeder schools rise, satisfies benchmark two).

110. *See* Robert D'Augustine, *A Loosely Laced Buskin? The Department of Education's Policy Interpretation for Applying Title IX to Intercollegiate Athletics*, 6 SETON HALL J. SPORT L. 469, 478-79 (1996) (arguing that courts are too rigid in applying the continuing program expansion test).

111. An even narrower reading was rejected in *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507, 1513-16 (D. Colo. 1993). In response to a challenge to its decision to drop the women's softball team, the institution argued it had expanded opportunities for women by increasing from zero opportunities in 1970 to 120 opportunities in 1992. The court noted, however, that no opportunities had been added recently and that opportunities for women had decreased disproportionately. Since 1980, opportunities for women had decreased from 183 to 120. During this same time, opportunities for men had decreased from 246 to 198. Thus, in twelve years, women's participation declined 34% while men's declined 20%. The easy answer to the school's argument is that it leaves out the "continuing" aspect of the program expansion standard. Title IX of the Education Amendment of 1972; A Policy Interpretation; Title IX and intercollegiate Athletics, 44 Fed. Reg. at 71,418.

institutions. It is a relatively simple task to compare the gender composition of an institution's athletes with that of its undergraduate population. Full accommodation, on the other hand, is necessary when a university has tried to expand athletic opportunities for women in good faith, but there is not sufficient interest and/or abilities to support varsity teams.<sup>112</sup> What then, is the continuing program expansion for? Is it simply a way station on the path to inevitable "substantial proportionality," or is it a substantive proxy for gender equality?

At one level, "continuing program expansion" merely restates an administrative enforcement policy. Title IX permits an agency to terminate federal financial assistance to a discriminatory education program or activity, but only if it has "determined that compliance cannot be secured by voluntary means."<sup>113</sup> Typically, after investigation, and as part of seeking voluntary compliance, the OCR will require institutions to enter into compliance agreements that specify what steps the institution should take in the future. In the context of intercollegiate athletics and claims of ineffective accommodation of students' interests and abilities, a compliance agreement might include a plan to assess student interests and to add additional sports over time. Thus, the "continuing program expansion" standard makes sense as an enforcement policy, especially if a plan of continuing expansion is what the OCR would require. The problem is whether an enforcement policy should define discrimination in federal courts when the federal government is not a party to the privately brought lawsuit.<sup>114</sup>

At another level, "continuing program expansion" merely states customary public policy against using courts and lawsuits to prolong, delay, or make expensive an otherwise simple and flexible compliance process. For example, the trial court in *Boucher* clearly thought a written plan should be part of an institution's claim of nondiscrimination under the program expansion standard. Given the court's other factual

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112. See, e.g., Connolly & Adelman, *supra* note 93, at 880-93; George, *supra* note 18, at 656-60; Jurewitz, *supra* note 21, at 345-48.

113. 20 U.S.C. § 1682 (2000).

114. A similar problem was raised under Title VII's disparate impact theory. The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(d) (2001), adopted by federal civil rights enforcement agencies, created a standard of impact necessary to trigger enforcement (called the "four-fifths rule"). While lower federal courts were tempted to use the guideline standard to define disparate impact as a matter of law, the "four-fifths rule" is more appropriately viewed as a policy allocating scarce enforcement resources. *Connecticut v. Teal*, 457 U.S. 440, 453 n.12 (1982). See Elaine W. Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793 (1978).

determinations, however, the court did not withhold judgment for the defendant institution on what it considered a formality.<sup>115</sup>

In contrast, it is easy to be skeptical about these institutions and any plans they might have to comply with Title IX's nondiscrimination goal.<sup>116</sup> Thirty years have passed since Title IX was enacted. Much has changed in the world of intercollegiate athletics, but little has changed for women at some of these institutions. Given the public policy pull on federal district courts not to interfere with the internal affairs of institutions of higher education, courts may be applying too lenient a standard in finding that any movement or change is sufficient for holding an institution in compliance with Title IX under the program expansion standard.

Properly applied, the "continuing program expansion" standard is a useful additional way to determine if an institution has effectively accommodated its students' interests and abilities. It is more than a way station on the road to substantial proportionality. Good faith and expansion are the keys to compliance. As the *Clarification* states, adding sports or increasing opportunities for women is essential to the program expansion standard.<sup>117</sup> That is, expansion is a separate goal of Title IX. Equally important is the notion that continuing program expansion is open-ended, involving a process that reflects both an institution's commitment to increase opportunities and its plan for expansion. In such a process, an institution must necessarily assess the interests and abilities of its students and analyze the possibilities of competition and recruitment. Adding a sport, increasing participation opportunities, responding to student interests and abilities and communicating a long term plan to students are all ways institutions can demonstrate their good faith in attempting to expand women's athletic programs. A written plan would be evidence of good faith and would rebut claims that the university is merely pursuing ad hoc actions in response to litigation.

This reading of the continuing program expansion standard is consistent with the role of athletics at higher education institutions. In their recent book on intercollegiate athletics with data on more than thirty

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115. *Cf., Cohen*, 101 F.3d at 187 ("[A]lthough we understand the district court's reasons for substituting its own specific relief under the circumstances at the time, and although the district court's remedy is within the statutory margins and constitutional, we think that the district court was wrong to reject out-of-hand Brown's alternative to plan to reduce the number of men's varsity teams.")

116. *Id.* The court stated, "We agree with the district court that Brown's proposed plan fell short of a good faith effort to meet the requirements of Title IX as explicated by this court in *Cohen II* and as applied by the district court on remand. Indeed, the plan is replete with argumentative statements more appropriate for an appellate brief. It is obvious that Brown's plan was addressed to this court, rather than to offering a workable solution to a difficult problem."

117. *Clarification*, *supra* note 69, at <http://www.ed.gov/offices/OCR/docs/clarific.html>.



academically selective institutions, James L. Shulman and William G. Bowen suggest that intercollegiate athletics can be justified for one of three reasons: "[I]ntercollegiate athletic programs can be justified either for their role as part of the core educational mission of a college (as "the sweatiest of the liberal arts"), for their role in building community spirit, or as an investment that provides financial support for the core educational mission."<sup>118</sup>

The first reason is often implicit in universities' mission statements, which invoke the pursuit of excellence in all things and encourage the training of leaders.<sup>119</sup> This is the easiest case to make for intercollegiate athletics, and it includes the traditional arguments that participation in intercollegiate athletics fosters learning for life, training for leadership, ability to work in teams, competitiveness, self-control and discipline.<sup>120</sup>

The second justification for college sports emphasizes their impact on building a sense of community at institutions of higher education.<sup>121</sup> The sense of pride in a school's athletic teams, campus ethos, and institutional reputation are exemplified not only by the students, but by others involved with or living around the school.

The third justification, revenue-generating capacity, is probably the most contested area in intercollegiate athletics.<sup>122</sup> Shulman and Bowen argue that schools can be seen as investing in an athletic enterprise whose ticket sales, endorsements, and donations may provide dollars that can be used to cover the cost of a range of activities.<sup>123</sup> They may also benefit the institutions by providing market exposure.<sup>124</sup> The authors assert that this investment can be assessed in the same manner as other investments the institution makes—by comparing revenues with expenses and calculating a rate of return.<sup>125</sup>

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118. SHULMAN & BOWEN, *supra* note 32, at 225. Regardless of the stated goals of an institution of higher education, Shulman and Bowen's data on students and alumni at these selective academic institutions do not support the financial justification for intercollegiate athletics. *See id.* at 266–67. Their data also cast doubt on whether participation in organized sports trains one to be a leader, especially later in life. *See id.* at 265. They find sports do have a direct effect on the core educational mission, especially in the kinds of students enrolled, the education they receive as undergraduates and the lives they go on to lead. *Id.* at 258–65.

119. *Id.* at 3.

120. *Id.*

121. *Id.*

122. *Id.* at 4.

123. *Id.*

124. *Id.*

125. *Id.*

The three justifications are not mutually exclusive, but, as Shulman and Bowen note, it is helpful to distinguish them so as to better focus on the rationale for supporting a particular kind of athletic program over another.<sup>126</sup> Similarly, separating the justifications illuminates the connection to the goals of Title IX in general and the goals of the program expansion standard in particular. For example, the revenue-generating possibilities, and its accompanying investment theory, may actually deter Title IX compliance. Congress specifically rejected an amendment to Title IX that would have exempted revenue-producing sports from its reach.<sup>127</sup> The regulation declines to put revenue-producing sports in a separate category or to treat them differently from other sports offered by the institution.<sup>128</sup>

In contrast, the continuing program expansion standard complements the other two justifications. Institutions support intercollegiate athletics because of their role in building community spirit, alumni loyalty, and institutional reputation. The Title IX question is: what role do women athletes play in building that sense of community, loyalty and reputation? Properly understood and applied, the continuing program expansion standard focuses on the process of increasing women's role in athletics, and thus, building a sense of community.

Similarly, institutions may consider their intercollegiate athletic program essential because they foster leadership, teamwork, competitiveness, self-control and discipline. These life skills are important to women as well as men. Increasing opportunities for women is essential to the continuing program expansion standard and should play an important part in an institution's core educational mission.

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126. *Id.*

127. The Tower Amendment provided that "[Title IX] shall not apply to an intercollegiate athletic [sic] to the extent that such activity does or may provide gross receipts or donations to the institution necessary to support that activity." 120 CONG. REC. 15,322 (1974). The Senate passed the Tower Amendment but the conference committee rejected it. As a result, Congress passed a different provision requiring the Department of Health, Education and Welfare to promulgate regulations that included, "with respect to intercollegiate athletics reasonable provisions considering the nature of particular sports." Gender and Athletics Act, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974). See Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORT L. REV. 1 (1992).

128. Title IX of the Education Amendments of 1972; The Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415-16 (providing that institutions are in compliance even if treatment, benefits or opportunities are not equivalent, as long as those differences result from nondiscriminatory factors, such as rules of play, rate of injury or the nature of facilities required for competition). The *Policy Interpretation* specifically provides that differences involving such factors will occur in programs offering football, and consequently these differences will favor men. *Id.* at 71,416. However, the distinction is not revenue-generating or non-revenue generating capabilities.

## VI. CONCLUSION

Schools address their equal athletic opportunity obligation in different ways. Some endorse the goal of substantial proportionality. Others claim that women's interests in sports is less than men's and argue that they should meet the relative interests of men and women equally. Some might try to sponsor single teams that are open to all participants on a competitive basis. Still others may opt for a more gradual process, expanding opportunities and assessing students' interests. Some might argue that a definitive rule, for example, favoring the traditional anti-discrimination principle or endorsing the goal of expansion, is necessary. Much can be said, however, in favor of avoiding definitive rulings.<sup>129</sup> Instead of looking for the ultimate resolution, the Title IX regulation and the *Policy Interpretation* endorse alternative ways of complying with Title IX and its multiple goals.

In terms of the program expansion standard, we need only agree that the exclusion of women from participation in intercollegiate athletics is a harmful effect of discrimination. If so, we can also agree that movement toward inclusion is an acceptable goal for Title IX without having to agree on the ultimate goal of how much inclusion is enough. This focus on process and progress is similar to the school desegregation cases where the courts required the elimination of racially identifiable schools as a remedy to segregation but did not fully articulate what a desegregated school system would look like.<sup>130</sup>

How then do the institutions in this study fare under this iteration of the continuing program expansion standard? The answer is unclear because the information the schools provided does not adequately address the key issues. As I have argued, the continuing program expansion standard is flexible and involves more individual decision-making. This open-ended standard allows courts to evaluate a variety of institutional circumstances. For Division I schools, the NCAA Certification process requires a gender equity plan.<sup>131</sup> Some schools have written these plans; other schools may have written plans but refused to share them outside the institution. Some of these plans would meet the tests of good faith and expansion that form

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129. Justice Brandeis famously noted, "the most important thing we do is not doing." ALEXANDER BICKEL, *LEAST DANGEROUS BRANCH* 71 (Yale Univ. Press 1986) (1962). See also, CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (Michael Aronson ed., 1999) (defending current Supreme Court decisions that avoid broad rulings and leave degree of flexibility to the political process).

130. See, e.g., *N.C. Bd. of Educ. v. Swann*, 402 U.S. 43 (1971); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

131. See *supra* text accompanying note 54.

the nucleus of the continuing program expansion standard. Others would not.

Division III schools are not subject to the NCAA Certification process. Many Division III schools are private institutions reluctant to share information or at least reluctant to make public what they consider private information. Division III schools often face the toughest choices. Their athletic programs rarely generate positive net revenues. A high proportion of the student body are athletes. Thus, whatever decisions these institutions make about intercollegiate athletics have broader implications for their sense of community and core educational mission than at large Division I schools.

Gender equity in intercollegiate athletics is not simply a matter of politics, rhetoric or expediency. The practical issues institutions face in terms of Title IX and their athletic programs are, of course, important. But working out what equality means in intercollegiate athletics is integral, not just for the athletes, but for all of us. Acknowledging the connection between sports and life skills such as leadership, teamwork, discipline and self-control, and the connection between sports and building a sense of community makes it easier to recognize that women have skills we value—but often miss.



## **NOTES**

